IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-906

UNITED AIR LINES, INC.,
Petitioner,

vs.

HARRIS S. McMANN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT HARRIS S. McMANN

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BRIEF FOR RESPONDENT HARRIS S. McMANN

OPINIONS BELOW

The Opinion of the District Court for the Eastern District of Virginia, Alexandria Division, dated September 2, 1975, is not officially reported. A copy appears in the Appendix at page 27. The Opinion of the Court of Appeals for the Fourth Circuit, dated October 1, 1976, is reported at 542 F.2d 217. A copy appears in the Appendix at page 31.

JURISDICTION

This Court has jurisdiction over this case under 28 U.S.C. § 1254(1), and *certiorari* was granted, —— U.S. ——, 97 S.Ct. 1098 (1977) on February 22, 1977, under this section. The Judgment of the Court of Appeals was entered October 1, 1976, and the Petition for Writ of Certiorari was filed December 30, 1976.

STATUTE INVOLVED

The statute to be considered in this case is the Age Discrimination in Employment Act of 1967, as amended, 91 Stat. 602, 29 U.S.C. §§ 621, *et seq.* (1970) (hereinafter "ADEA" or the "Act"). Subsections (a) and (f) of Section 4 of the Act (29 U.S.C. § 623 (1970)) and Section 5 of the Act (29 U.S.C. § 624 (1970)) are set out at pages 2-3 of Petitioner's brief. However, Respondent makes the following addition of Section 2 of the Act (29 U.S.C. § 621 (1970)), which provides:

> "(a) The Congress hereby finds and declares that—
>
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.
>
> (b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."

QUESTION PRESENTED

Is the involuntary retirement of an employee, pursuant to a pension plan which antedates the Act and which has a "normal retirement age" of 60, permissible under the Age Discrimination in Employment Act of 1967.

STATEMENT OF THE CASE

This is an action brought by Mr. Harris S. McMann (hereinafter "McMann"), a retired former employee of Petitioner United Air Lines, Inc. (hereinafter "United") requesting injunctive relief, reinstatement and back pay under the Act as a result of his involuntary retirement by United at age 60. United based his retirement on his participation in a retirement income plan which covered him and other employees in his job classification.

The facts were stipulated. McMann was born January 23, 1913 and was hired by United April 14, 1944. He continued to serve in the employ of United in various capacities until United forced him to retire.

His most recent position was that of "Technical Specialist—Aircraft Systems".

At the time McMann was hired by United in 1944, United had in effect the retirement income plan which provided retirement benefits to employees who were eligible to join and who did join the plan.

McMann did not elect to join the plan until January 23, 1964. At that time, McMann applied for participation in the plan with an effective date of February 1, 1964. McMann participated in the "non-union flight plan" initially, but in June 1965 he was transferred from that plan to the "pilots' pension plan".

At various times during his participation in the plan, McMann was sent annual statements and summaries of the plan. All relevant materials he received regarding the benefits of the plan and his participation in it described the "normal retirement age" as age 60.

This language precisely tracked the language of the plan itself [1] which consists of an annuity contract between United and Connecticut General Life Insurance Company and John Hancock Mutual Life Insurance Company. The Plan also provides for both early retirement and superannuated employment of participants.

On January 23, 1973, McMann reached his 60th birthday. On February 1, 1973, the first day of the

[1] Part 32 of the Plan, "SPECIFICATIONS—PILOTS" provides "A Participant's Normal Retirement Date is the first day of the month following his 60th birthday." There is no language in the Plan that further defines "normal retirement age".

month following his 60th birthday, McMann was involuntarily retired by United.[2] Shortly before his retirement, McMann notified the Secretary of Labor of his intent to sue, based upon United's alleged violation of the Act in requiring him to retire at age 60. No satisfactory resolution of the case was reached through this channel and, on January 31, 1975, McMann filed suit in the U.S. District Court for the Eastern District of Virginia, Alexandria Division. McMann asserted that his involuntary retirement constituted an act of age discrimination and was unlawful under the Act. United, in its Answer, raised the defense that McMann's retirement was in accordance with the terms of a bona fide employment benefit plan within the meaning of Section 4(f)(2) of the Act.

On July 15, 1975, McMann and United entered into a stipulation of facts. Both parties moved for summary judgment and on August 1, 1975, the matter came before the District Court for a hearing. On September 2, 1975, the District Court, Judge Albert V. Bryan, Jr., presiding, granted United's motion for summary judgment and dismissed McMann's suit. McMann appealed this decision to the Court of Appeals for the Fourth Circuit.

In the Court of Appeals, the Secretary of Labor entered the case and filed a brief *amicus curiae* on behalf of McMann. In the Court of Appeals, Mc-

[2] It is interesting to note that, although United forced McMann to retire at age 60, UAL Inc., United's holding company, recently asked its Chief Executive Officer, Edward E. Carlson, to continue working beyond age 65, presumably his "normal retirement age". *Hanging in There After 65*, BUSINESS WEEK (January 17, 1977) 20, 21.

Mann argued that United's action in forcing him to retire at age 60 constituted a violation of the Act, and that the exemption provided in Section 4(f)(2) of the Act was, under the circumstances, not available to United.

United argued that the District Court's decision was proper in that the Act expressly permits an employer to ". . . observe the terms of any *bona fide* employee benefit plan . . . which is not a subterfuge to evade the purposes of this Act. . . ." United further argued that because the plan was instituted many years before the Act was passed, it could not possibly be considered a subterfuge to evade the purposes of the Act.

At oral argument before the Fourth Circuit, Counsel for United, responding to a question from the court, stated that he would be "hard pressed" to give facts upon which United could, under the Act, justify a new pension plan with a retirement age of 55. Although he attempted to give such facts, the court obviously was not swayed by his answers, and, in fact, considered that he had conceded that if the plan were set up today, it would violate the Act.[3]

The Court of Appeals entered its Opinion on October 1, 1976, and reversed the District Court. The Court ruled that merely because a pension plan had been in existence prior to the passage of the Act, it did not follow that such a retirement plan was automatically not a subterfuge to evade the purposes of the Act. The Court of Appeals remanded the case to the

[3] This "concession" was noted by the Court of Appeals in its Opinion, 542 F.2d 217, 221.

District Court. United then filed its Petition for a Writ of Certiorari on December 30, 1976, which was granted on February 22, 1977.

SUMMARY OF ARGUMENT

There are many policy reasons, particularly economic, which dictate in favor of allowing a person to work as long as he is able to and wants to. The person, the plan, the employer and society all benefit financially from postponing retirement.

The language of Section 4(f)(2) of the ADEA does not have a "plain meaning". The statute should therefore be construed to give effect to the broadest remedial intentions of Congress, which has identified the elderly worker as deserving of special protection. Such a construction requires that there must be some criteria other than age before involuntary retirement can be allowed.

The legislative history of the ADEA is somewhat inconclusive. This record reflects no intention to allow involuntary retirement, but the language of the statute appears to allow some involuntary retirement. Since there was no apparent legislative intent to allow involuntary retirement, the statute should be construed accordingly.

Congress, in the language of the statute, has explicitly placed the burden of proof of showing that a plan is not a subterfuge to evade the purposes of the Act on the employer. Decisions by this Court under Title VII of the Civil Rights Act of 1964 are consistent in placing the burden of showing an exception to the operation of that Act on the employer.

The position of the Secretary of Labor does not conflict with prior interpretive bulletins of the Department. The bulletins, by their terms, are interpretive, and further, the primary measure of the acceptability of the plan under Section 4(f)(2) is the language of that section. It is precisely the meaning of this language which is the issue before this Court.

Finally, the terms of United's pension plan require an affirmance of the decision below. Although the question was not reached by the Fourth Circuit, the exception in the statute requires that a retirement plan be mandatory. The plan only specifies a "normal" retirement date and does not compel retirement at age 60.

ARGUMENT

I. POLICY CONSIDERATIONS FAVOR THE VIEW TAKEN BY THE LOWER COURT

The problem of retirement involves many different areas which must be considered. Economics, sociology, psychology, and physiology, all play a role in decisions about retirement.

The basic policy choice with respect to the employment of aged persons has already been made by the Congress, at least within the statutorily protected age range from 40 to 65.[4] The basic policy as enunciated by the Congress is set forth in 29 U.S.C. § 621. It is obvious from the language of that provision that Congress has deliberately chosen to maximize the employment of older persons.

[4] See 29 U.S.C. § 631 (1970).

In addition to this congressionally enunciated policy, there are many other policy considerations which support the Fourth Circuit's decision. Economically, the question of retirement at age 60 has many ramifications. First, from the point of view of the retiree, retirement at age 60 can be economically devastating. A person is not eligible for Social Security old age benefits until his 62nd birthday. This, of course, means that a person, such as McMann, cannot possibly receive Social Security benefits for at least two years after his retirement. Even when he is eligible for Social Security at age 62, he must, unless he wishes to wait until he is age 65, accept a reduced level of benefits. This reduced level of benefits does not end at age 65, but it continues throughout the life of the pensioner. This is done without any realistic choice being given to the recipient, as it is virtually necessary that the retiree elect to receive Social Security benefits at age 62 under such circumstances. By being forced to retire at age 60, the pensioner also normally receives a smaller amount in retirement benefits under a pension plan than if he were allowed to continue contributing to the plan until his 65th birthday, or until a later retirement date.

Additionally, an individual's "work-life" earnings are increased by prolonging his working career. An increased work-life has several beneficial economic effects: a higher standard of living is prolonged for the worker; his period of economic dependency is decreased; the worker has an increased opportunity to accumulate funds for his retirement period; and his role as a producing member of society is prolonged.

Second, the use of a later retirement date has economic effects on the plan itself. As Professor Bernstein points out, the pension plan costs less to fund and maintain:[5]

> "Savings comes from two sources. Mortality before retirement eliminates or reduces the benefits payable. In addition, the higher retirement age shortens the period during which benefits will be paid to retirees."

In fact, a pension plan with a mandatory retirement age of 60 requires a 51% greater level of funding accumulation to achieve the same level of benefits as a plan which requires retirement at age 65.[6] A later retirement date can also result in increased benefits to all participants in the plan without a corresponding increase in the funding. A longer working life can likewise result in savings to the employer by allowing him a longer period to amortize the cost of training the employee. This is especially important in industries where training is very expensive or prolonged.

The type of analysis applicable to the cost of a pension plan is also applicable to the cost of paying Social Security benefits. The younger the age of the recipient at the commencement of benefits, the longer the period of time during which benefits must be paid, and the greater the amount of money which must be paid. The higher the age for commencement of bene-

[5] M. C. BERNSTEIN, THE FUTURE OF PRIVATE PENSIONS, 224, 226 (1964).

[6] W. C. GREENOUGH & F. P. KING, PENSION PLANS AND PUBLIC POLICY, 233. (1976). The delay of benefit payments past age 65 results in a similar rate of cost savings to the plan.

fits, the lower the cost of the program will be, or the higher the benefits which can be paid at the same cost. This has been recognized by Congress in the 1972 amendments to the Social Security Act. A recipient can now delay receiving Social Security benefits past his 65th birthday, and, for each month that he delays and continues working, his Social Security benefits are increased by 1/12th of 1%, up until his 72nd birthday.[7]

Demographic trends also play an important role in the selection of proper alternatives in this area. At the present time, there is a substantial shifting in the age of the population of the United States, which is becoming older. There are several reasons for this. First, the increased life expectancy of the population means that there are more and more people living to a greater age. Second, the "post-war baby boom" has fizzled, and the birth rate is declining to the point where a zero growth rate is being approached. This means that as the crop of post-war babies ages, their influence will be out of proportion to the rest of the population. One effect of this will be an increased percentage of "dependent" persons as these people reach retirement age. Presently, there are approximately three persons working who support one social security recipient. When the age shift in the population reaches its peak, there will be one person dependent upon social security to two people who are working. Increasing the work-life span will help to ameliorate this situation.

It should be noted that both Social Security payments and payments under an employee benefit plan

[7] 42 U.S.C. § 402(w) (Supp. 1974).

have an inflationary effect on the general economy. This is because the worker is not actively producing in the economy, but is simply being paid as a non-producer.

Most pension plans do not increase their benefits after the participant's retirement. This, of course, means that the participant has a stagnant income in an inflationary society, leaving him far behind in actual purchasing power. This leads to the further result that the economic gap between retired persons and employed persons is growing, since presently employed workers are much closer to having their income keep pace with inflation than the retired persons. This simply exacerbates the economic deprivation of older Americans.

Finally, personal preference will play a large role in the economic effects of a retirement system. While at present it is impossible to say how many persons would work beyond a given age, if given the choice, such determinations could be easily made by an actuary once a small amount of experience has been accumulated. Of course, not all participants would elect to work as long as possible. Many would retire early, and many more would retire at the "normal" retirement age. There would, nonetheless, be some who shared the sentiments of Mr. Justice Samuel Miller who did "not believe a healthy man of 70 years accustomed to any kind of work, mental or physical, ought to quit it suddenly".[8]

Retirement, especially involuntary retirement, has certain physiological effects on the retiree. While the

[8] Quoted in C. FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 391 (1939).

precise extent of such effects is unknown, recent work in the field indicates that the effects can be severe. Mortality rates for mandatorily retired employees can be as much as 30% higher than what would normally be expected in the third year of retirement.[9] Additionally, mandatory retirement can lead to a general decline in the state of the health of the retiree.[10] These effects are apparently the result of disenchantment with the enforced idleness which accompanies involuntary retirement.

Retirement also has sociological and psychological effects on the retiree. The effects primarily are the feeling of uselessness and isolation caused by the withdrawal of employment, and the actual increased isolation from society that normally accompanies retirement. These effects are obviously inter-related with the medical and economic effects of retirement and it is virtually impossible to show where each effect is derived from.[11]

It is submitted that all of these policy considerations support the position taken by the Fourth Circuit, and that the opinion of that Court should be affirmed.

[9] Haynes, *Survival After Voluntary and Involuntary Retirement* to be published in NATIONAL INSTITUTES OF HEALTH, PROCEEDINGS OF THE CONFERENCE ON THE EPIDEMIOLOGY OF AGING (1977).

[10] AMERICAN MEDICAL ASSOCIATION, COMMITTEE ON AGING, RETIREMENT—A MEDICAL PHILOSOPHY AND APPROACH (1971).

[11] *See e.g.*, H. A. RHEE, HUMAN AGING AND RETIREMENT (1974). Rhee takes what he calls a "cross-disciplinary" approach to the problem of aging and retirement, as no one discipline, by itself, can satisfactorily solve all of the problems involved in the area of aging.

II. SECTION 4(f)(2) OF THE ACT DOES NOT HAVE A "PLAIN MEANING" AND IT SHOULD THEREFORE BE CONSTRUED IN LIGHT OF ITS PURPOSE

The Act declares its purpose is to "promote employment of older persons based on their ability rather than age; [and] to prohibit arbitrary age discrimination in employment . . ." 29 U.S.C. § 621(b). Underlying the Act is Congress' finding that "the setting of arbitrary age limits regardless of job performance has become a common practice . . ." 29 U.S.C. § 621(a)(2). In order to prevent such discrimination, Section 4(a)(1) of the Act makes it "unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's age." 29 U.S.C. § 623(a)(1).

United, however, argues that the forced retirement of McMann is exempt from the operation of the Act under the terms of Section 4(f)(2) of the Act (29 U.S.C. § 623(f)(2)), which provides in relevant part:

> "It shall not be unlawful for an employer . . . (2) to observe the terms of a . . . bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual."

Judge Tuttle's comment, in his dissent in *Brennan* v. *Taft Broadcasting Company,* 500 F.2d 212, 220 (5th Cir. 1975), that "the language of the statute creating an exception, if, in fact, it really does create an exception, is not artfully worded" is probably the most accurate of all judicial statements made concerning this provision.

Nevertheless, United and the Chamber of Commerce argue that the plain meaning of this Section exempts United's plan from the operation of the Act. This is despite the fact that three United States Circuit Courts of Appeal have considered the meaning of the exemption and they have reached three radically different results. In *Taft Broadcasting* the majority of the Fifth Circuit held that the statute did have a plain meaning and that the operation of Taft Broadcasting's profit-sharing plan was exempt from the operation of the Act. Judge Tuttle, in his dissent, reached a completely different conclusion. He not only disagreed as to the outcome of the case on its merits, but he disputed that the statute did, in fact, have a "plain meaning". The most persuasive argument in favor of Judge Tuttle's position is the very fact that he dissented, based on his interpretation of the meaning of the statute. In the court below, the Fourth Circuit reached a result which was completely contrary to that of the Fifth Circuit.[12] The lower court held that, in order to come within the statutory exception, the defendant must show some reason, other than the mere age of the plaintiff. The third case under the Act is *Zinger* v. *Blanchette,* 549 F.2d 901 (3rd Cir. 1977). The Third Circuit, faced with the conflict between *Taft Broadcasting* and *McMann,* resorted to an examination of the legislative history of the Act, and concluded that the Act was not aimed at the prohibition of involuntary retirement.

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[12] McMann v. United Air Lines, Inc., 542 F.2d 217 (4th Cir. 1976).

The examination of these three opinions can lead to only one conclusion: that Section 4(f)(2) has no "plain meaning". In the absence of a "plain meaning" of the statute, it should be construed in light of its purposes and legislative history (discussed *infra*).

As is obvious from the purposes enunciated in Section 2 of the Act, the Act is remedial in its nature. That is, it was intended to remedy an existing wrong. Since the Act is remedial in nature, it should be liberally construed to give effect to the Congressional intent. *Peyton* v. *Rowe,* 391 U.S. 54 (1968). It should also be remembered that by passing a remedial statute, the Act, Congress has singled out a particular group, older workers, for special protection. Congress is the branch of government which is institutionally designed to identify and weigh various social values. *See, Railway Express Agency, Inc.* v. *New York,* 336 U.S. 106, 109-110 (1949).

Not only does the remedial nature of the statute mandate a liberal construction of the Act, but exceptions to the general provisions of the Act require narrow construction. *A. H. Phillips, Inc.* v. *Walling,* 324 U.S. 490 (1945), *Mitchell* v. *Kentucky Finance Co.,* 359 U.S. 290 (1959); *Arnold* v. *Ben Kanowsky, Inc.,* 361 U.S. 388 (1960). Further, as Justice Murphy wrote with respect to the Fair Labor Standard Act in *A. H. Phillips,* 324 U.S. at 493.

> "Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard for the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process and the announced will of the people."

It is upon such an exemption that United relies, specifically the exception for bona fide employee benefit plans in Section 4(f)(2).

Statutes should also be construed to each of the terms used by the legislature. A pension plan must therefore be both "bona fide" and "not a subterfuge to evade the purposes of the Act" in order to fall within the exception of Section 4(f)(2). While the term "bona fide" has not been precisely defined by the courts, both the Third and Fourth Circuits have used, as a working definition, the term to describe a plan which pays substantial benefits to the participant.[13]

The "subterfuge" clause requires somewhat more analysis. The "bona fide" and "subterfuge" provisions cannot be read as being equivalent to each other. To do so is obviously to disregard the fact that Congress put both requirements in the statute, not one. Therefore, even if "bona fide" means "paying substantial benefits", the "subterfuge" clause requires more than the mere payment of benefits.

The Act clearly provides that a retirement plan must not be a subterfuge to evade the *purposes* of the Act. These purposes are clearly spelled out in Section 2 of the Act, *supra.* Essentially, the purpose is to prohibit arbitrary age discrimination in employment.

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[13] Although both courts have used the term "substantial benefits", neither court has attempted to say what the parameters of such benefits could be. It is conceivable that under certain circumstances, retirement at half salary could easily be considered to be "without paying substantial benefits."

Therefore, if this clause is to have any meaning, there must be something other than a simple criterion of age. Any other construction of the Section 4(f)(2) exception "would be too wide a door through which the content of the Act would disappear." *Schultz* v. *Wheaton Glass Company,* 421 F.2d 259, 265-266 (3rd Cir.), *cert. denied,* 398 U.S. 905 (1970). The Third Circuit in *Zinger,* although allowing involuntary retirement before the age of 65, seemed to be aware of the ironic situation which would flow from its decision when it noted:

> "[l]ogically, allowing such a broad exemption may be inconsistent with the prohibition against discrimination in hiring and produce the anamoly that a person who has been involuntarily retired by one company before 65 may not be discriminated against by applying for employment at another company." 549 F.2d at 909.

It is clear that the statute must be construed to require some criteria other than age for an involuntary retirement. To simply allow involuntary retirement with a pension of some unknown magnitude flies in the face of the purpose of the statute. To allow such a broad exemption from the operation of the statute would be virtually to gut the statute of any practical meaning.

III. THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THE LEGISLATIVE HISTORY OF THE ACT

The Fourth Circuit, in reaching its decision, examined the legislative history of the Act as an aid to the construction of the statute. The court concluded that Congress did not intend to allow forced retirement under the Act.

An examination of the legislative history should focus on the Committee Reports and the floor debates prior to a vote on the Act as these reflect the intent of Congress, as a body, most clearly. This examination shows that the Congress was concerned with the protection of pension and benefit plans by allowing an employer to exclude a newly hired older person from such plan.

The joint House-Senate report on the bill states, with reference to the provision that became U.S.C. § 623(f)(2):

> "It is important to note that exception (3) applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans." [14]

At the time the Senate voted on the Act, Senator Javits, who introduced the amendment giving Section 4(f)(2) its final form, made the following statement by way of introducing discussion of the benefit plan provisions:

> "The amendment relating to seniority systems and employee benefit plans is particularly significant: because of it an employer will not be compelled to afford older workers exactly the same pension, retirement, or insurance benefits as younger workers and thus employers will not, because of the often extremely high cost of providing certain types of benefits to older workers,

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[14] H.R. REP. No. 805, 90th Cong., 1st Sess. 4 (1967); S. REP. No. 723, 90th Cong., 1st Sess. 4 (1967).

actually be discouraged from hiring older workers." [16]

This was followed by a colloquy between Senator Javits and Senator Yarborough, the floor manager of the bill, regarding the meaning of the provision. Senator Javits stated:

> "The meaning of this provision is as follows: An employer will not be compelled under this section to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers. If the older worker chooses to waive all of those provisions, then the older worker can obtain the benefits of this act, but the older worker cannot compel an employer through the use of this act to undertake some special relationship, course, or other condition with respect to a retirement, pension, or insurance plan which is not merely a subterfuge to evade the purposes of the act—and we understand that—in order to give that older employee employment on the same terms as others.
>
> "I would like to ask the manager of the bill whether he agrees with that interpretation, because I think it is very necessary to make its meaning clear to both employers and employees. . . .
>
> "MR. YARBOROUGH. [I]t means that a man who would not have been employed except for this law does not have to receive the benefits of the plan. Say an applicant for employment is 55, comes in and seeks employment, and the company has bargained for a plan with its labor union that provides that certain moneys will be put up for a pension plan for anyone who worked for the employer for 20 years so that a 55-year-old employee would not be employed past 10 years. This means he cannot be denied employment because he is 55, but he will not be able to participate in that pension plan because unlike a man hired at 44, he has no chance to earn 20 years retirement. In other words, this will not disrupt the bargained-for pension plan. This will not deny an individual employment or prospective employment but will limit his rights to obtain full consideration in the pension, retirement, or insurance plan." [16]

[16] 113 CONG. REC. 31,254-31,255 (1967).

This understanding of the language of the bill was shared in the House of Representatives. Representative Smith stated:

> "Since the language of sec. 4(f) is not clear, the language of the report is important. The report states that: 'This exception serves to emphasize the primary purpose of the bill—hiring older workers—by permitting employment without necessarily including such workers in employee benefit plans.'" [17]

Representative Daniels stated that the provision was intended to protect employers by not necessitating the participation of older works in such benefit plans:

> "The point should be made, however, that the bill takes into full consideration the problems and interests of employers. It allows for situations in employment where age is a bona fide occupational qualification for a particular job. It also takes account of the problems of employers in the field of pension and other benefit plans. The bill would

[16] *Id.* at 31,255. See also the remarks of Senator Young, *id.* at 31,256, dealing with mandatory retirement.

[17] *Id.* at 34,745.

permit the hiring of older workers without requiring that they necessarily be included in all employee benefit plans. This provision is designed to maximize employment possibilities without working an undue hardship on employers in providing special and costly benefits." [18]

These statements indicate a clear and unequivocal understanding by Congress of the bill's intent. There was virtually no discussion on the floor about involuntary retirement. The only issue addressed was the participation in benefit plans.

Although the legislative intent is clear, the language of the statute is not, when compared to the intent. As the Fourth Circuit stated:

> "Although we conclude from the legislative history that Congress did not intend retirement plan provisions ever to excuse the failure to hire *or the discharge* of any individual, but only to permit exclusion of some workers *from the plan* on the basis of age where exclusion is justified by economic considerations, we recognize that the statute as drafted does permit an employer to discharge employees 'to observe the terms of' a plan." 542 F.2d at 221. (Emphasis original)

It should be pointed out that no party to this case has argued, nor did the court below hold, that all involuntary retirement is prohibited by the Act.

The problem is presented as a question of what must be shown under the ADEA before an employer can force an employee to retire. The legislative history of the Act can be used to show what Congress intended, and to show what the attitude of Congress

[18] *Id.* at 34,746.

was toward the problem. The intent of Congress was to promote the employment of older workers, and to allow them to be excluded from benefit plans if this was necessary for the economic protection of the plans. The Act should be construed to give effect to this intent.

IV. THE DECISION BELOW PROPERLY REFLECTS THE ASSIGNMENT OF THE BURDEN OF PROOF UNDER THE STATUTE TO THE EMPLOYER

The Chamber of Commerce of the United States of America, as *amicus curiae,* asserts that the burden of proof, on the question of whether or not a pension plan is a subterfuge under the Act, is shifted back to the plaintiff if the defendant has demonstrated that the plan is bona fide. This argument is based on cases decided by this Court under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000 *et seq.* (1970). The *amicus* quite correctly states that the rule in such cases is that, once a plaintiff has made out a prima facie case, the employers have the burden of showing their tests are in fact job related. When this is done, the complaining party must then show that other tests, without an undesirable discriminatory effect, would serve the employer's interest equally well.

The *amicus* contends that the Fourth Circuit put a different burden on employers when it requires that the employer must prove the non-existence of a subterfuge as well as the actual benefits of its retirement plan. While it is true that the employer must prove both of these elements, this is, in fact, exactly equivalent to the burden which this Court has imposed in

the Title VII cases. 42 U.S.C. § 2000e-2(h) (1970) provides that an employer may use any professional developed ability tests "provided that such test, its administration or action upon results is not designed, intended or use to discriminate because of race, color, religion, sex, or national origin." The burden which this Court has placed on employers under this section is precisely equivalent to the exception provided in the statute. The employer must show that the ability test is not designed, intended or used to discriminate. As a practical matter, this is done by showing that the skills measured by a particular test are job related. *Griggs* v. *Duke Power Company,* 401 U.S. 424 (1971). In *Griggs,* this Court stated that

> "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S. at 432.

The same situation is true under the ADEA. The exception in Act for employee plans is premised upon two conditions. First, that the plan is bona fide, and second, that the plan is not a subterfuge to evade the purposes of the Act. This is the language which Congress placed in the provision granting the exception to the Act, and, as *Griggs* shows, the employer must meet the burden of proof in order to show that he comes within the exception to the Act.

The contention of the *amicus* that the burden cannot be on the employer because "no party can prove a negative" is belied by the very cases which are cited in support of its argument. As pointed out above, the burden under 42 U.S.C. § 2000e-2(h) is also a negative burden. The employer must show that the test has

not been designed or used with a discriminatory purpose. This obviously is proving the negative, and this goal has obviously been achieved, as reflected by this Court's decisions in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), and *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975).

It should also be noted that the references to "subterfuge" and "pretext" which *amicus* refers to are not based upon statutory language in the Title VII cases, but are instead simply statements by courts, including this Court, that relief may be granted to plaintiffs even though the defendant has apparently compiled with the statutory requirements. Under ADEA, however, the language is found in the statute. It is used to limit an exception to the purposes of the Act. Under such circumstances, the burden of proof must clearly fall upon the employer.

V. THE CURRENT POSITION OF THE SECRETARY OF LABOR IS COMPATIBLE WITH THE INTERPRETIVE BULLETINS ISSUED BY THE DEPARTMENT OF LABOR

It is suggested, both by United and by the Chamber of Commerce, that the Fourth Circuit erred in that it disregarded the "contemporaneous administrative regulations" issued by the Department of Labor subsequent to the effective date of the Act. They suggest that the interpretive bulletin issued by the Secretary is in direct conflict with the position taken by the Secretary, as *amicus,* in the Fourth Circuit. They suggest that, in light of such conflict, the initial regulations should be followed, and the current position of the Secretary should be ignored.

While not presuming to speak for the Deparment of Labor, who will file an *amicus* brief in this Court, respondent submits that the Fourth Circuit did not err in accepting the Secretary's position. Essentially, there is no conflict between the Secretary's published regulation and his position in this litigation.

On June 21, 1968, nine days after the effective date of the Act, the Secretary's interpretive bulletin on involuntary retirement was issued, 33 Fed. Reg. 9172. This became 29 C.F.R. § 860.110:

> "§ 860.110 Involuntary retirement before age 65.
>
> (a) Section 4(f)(2) of the Act provides that "It shall not be unlawful for an employer, employment agency, or labor organization * * * to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * *." Thus, the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of section 4(f)(2). The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not, in and of itself, render an otherwise bona fide plan invalid insofar as the exception provided in section 4(f)(2) is concerned."

As a part of the process of issuing interpretive bulletins, the Secretary issued some guidelines as to the purposes of the interpretive bulletins. 29 C.F.R. § 860.1 provides:

> "§ 860.1 Purpose of this part.
>
> This part is intended to provide an interpretive bulletin on the Age Discrimination in Employment Act of 1967 like Subchapter B of this title relating to the Fair Labor Standards Act of 1938. Such interpretations of this Act are published to provide 'a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it' (Skidmore v. Swift & Co., 323 U.S. 134, 138). These interpretations indicate the construction of the law which the Department of Labor believes to be correct, and which will guide it in the performance of its administrative and enforcement duties under the Act unless and until it is otherwise directed by authoritative decisions of the Courts or concludes, upon reexamination of an interpretation, that it is incorrect."

It is important to note several things with respect to the purpose of the interpretive bulletin. First of all, to state the obvious, it is an interpretation. It is not a regulation with the force of law.[19] It was merely intended to be a practical guideline, and nothing more. It was certainly never intended to be an ironclad rule, as is indicated in the provision itself. Section 860.1 simply states that it will guide the Department of Labor, but only until otherwise directed by a court, or until the Department concludes, through its own internal processes, that an interpretation is incorrect.

An examination of § 860.110 is in order. The bulletin quotes the language of the statute and then states only that involuntary retirement is permissible when the requirements of Section 4(f)(2) are met. The

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[19] *See, e.g.*, 29 C.F.R. Part 850.

bulletin itself does not, in any way, attempt to define or delineate precisely what those requirements are. The requirements of Section 4(f)(2) are, in fact, what are being litigated in this case. The precise question involved here is whether United's pension plan does meet the requirements of Section 4(f)(2).

Petitioner's reliance on *General Electric Co.* v. *Gilbert*, —— U.S. ——, 97 S.Ct. 401 (1976), is therefore somewhat misplaced. The later regulation in *Gilbert* was in direct conflict with other indicia of the proper interpretation of the statute, including the language used when the bill was being amended in the Senate. In the case of § 860.110 there is no conflict. While it is true that the bulletin may not clarify the requirements of Section 4(f)(2), it certainly does not give carte blanche to involuntary retirement.

The position of the Department of Labor with respect to the Section 4(f)(2) exemption has been published in the annual reports to Congress under the Act. The Department of Labor's position is that a mandatory retirement provision is unlawful unless such provision:

> "(1) is contained in a bona fide pension or retirement plan;
>
> (2) is required by the terms of the plan and is not optional; and
>
> (3) is essential to the Plan's economic survival or to some other legitimate purpose—*i.e.*, is not in the Plan for the sole [p]urpose of moving out older workers, which purpose has been made unlawful by the ADEA." [20]

[20] U.S. DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, REPORT COVERING ACTIVITIES UNDER THE ACT DURING 1974, 17.

This position is consistent with both the interpretative bulletin issued by the Secretary and with the language of the statute. The first condition tracks the language of the statute and that of the interpretive bulletin. The second provision is a logical conclusion reached by an interpretation of the statute which is consistent with its purposes. The third provision again reflects the Congress' concern with the protection of existing benefit plans. A considerable portion of the legislative history is concerned with the economic effects the Act might have on existing pension plans, and this third requirement is certainly consistent with the Congress' intent not to cause harm to these plans by the provisions of the Act.

Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944), states the weight to be given an administrative interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking the power to control." 323 U.S. at 140. When these standards are applied to the Secretary's present position and the position reflected in the interpretative bulletin, it is apparent that the Secretary's position is entitled to the "high marks" of *Gilbert*. The Secretary's present position has been based upon an exhaustive study of a legislative history of the statute; it is not inconsistent with the earlier bulletin; and the rationale behind it is sound. Further, the "policies are made in pursuance of official duty, based upon more specialized experience and broader investigation and information. . ." *Skidmore, supra* at 139. It is interesting to note that the first

interpretative bulletin came out immediately after the effective date of the statute. In fact, the Department of Labor produced an entire chapter in the Code of Federal Regulations in approximately ninety days. Such time limitations obviously are not conducive to a thoroughness in the consideration of the regulations.

One further issue needs clarification at this point. At no time has the Department of Labor said that there can be no forced retirement before age 65. The position of the Department is that there simply must be more than the chronological age of a participant in a pension plan. This is premised, as pointed out previously, on the purpose of the statute, which is to prevent discrimination based solely upon age.

VI. UNITED'S PILOTS PENSION PLAN, BY ITS TERMS, DOES NOT MANDATE RETIREMENT AT AGE 60, AND THEREFORE CANNOT BE WITHIN THE EXCEPTION OF SECTION 4(f)(2)

As pointed out previously, the actual pension plan involved in the case is a group annuity contract between United and two insurance carriers.[21] Neither McMann nor his union, the Air Line Pilots Association, had any control over the language in this contract concerning retirement dates. The terminology used in it was determined by the parties to the contract. Yet it is upon the unprecise language of this contract that United relies.

The language used in the annuity contract is that the "normal" retirement date of a participant in McMann's job category is the first day of the month next following his 60th birthday. Nowhere in the

[21] See p. 4, *supra*.

plan is there a definition of "normal" or any indication that such language means "mandatory". Contrariwise, there are provisions elsewhere in the contract that provide for retirement prior to age 60 and continued employment beyond age 60, with the consent of the employer. Further, McMann did not even see or have knowledge of the terms of the contract. He was provided only with summaries of the Plan, and these summaries only referred to the "normal retirement date" of the participant. These summaries made no mention of any obligation on the part of a participant to retire on the "normal retirement date", either by precise terms or by implication.

There have been only two instances where appellate courts have discussed the definition of "normal retirement date" under the Act. In the present case, the Fourth Circuit briefly touched on the issue[22] but did not find it necessary to decide it because its decision was based on broader grounds. It simply noted that the definition was not clear. In *Brennan* v. *Taft Broadcasting Co., supra,* the question was addressed by Judge Tuttle in his dissent.

Judge Tuttle, in his dissent, adopted the Department of Labor's argument in favor of a strict construction of an exception to the statute. He then pointed out that,

> "There is no categorical statement that the 'normal date of retirement' is the compulsory date. . . . Without this language, of course there is nothing to warrant a construction of the document to mean 'compulsory' date rather that 'normal' date of retirement. The statement that the

[22] 542 F.2d at 219.

normal date of retirement is age sixty clearly implies that there are other dates within the minds of the parties.

. . .

"In light of this requirement for a narrow construction of the statute, it would seem that at the very least, in order for a purported 'plan of retirement' to be permitted to withdraw employees from the protection of the Act, such plan must state in categorical terms that its members are subject to compulsory retirement at a time or under conditions differing from those of the statute. As pointed out above, this purported plan falls far short of containing any such provision." (*Id.* at 219, 220)

In the present case, McMann, like Mr. Jones in *Taft Broadcasting,* was informed only that the "normal" retirement age was 60. The material received by McMann was completely devoid of any categorical statement that retirement at age 60 was mandatory.

On the other hand, in *Hodgson* v. *American Hardware Mutual Insurance Co.,* 329 F.Supp. 255 (D. Minn. 1971) the court determined that the Defendant (the insurance company) could not retire an employee who was not a member of the pension plan with a mandatory retirement age of 62. The court noted (329 F.Supp. at 229) that the employer could discriminate by retiring a plan member before the age of 65. However, the court also pointed out that

"[r]etirement at age sixty-two for Plan members is permitted only because it is pursuant to the Plan. . . . The Defendant employer retires female Plan members at age sixty-two because it is *compelled* to do so under the terms of the Plan." *Id.* at 228 (emphasis added).

It is respectfully submitted that this "normal" terminology is not sufficient to allow United to force the retirement of McMann. The word "normal" has been construed in a number of cases dealing with a variety of problems. The cases are concerned with such diverse areas as water flows (*United States* v. *Fallbrook Public Utility District,* 109 F.Supp. 28 (S.D. Cal., 1952)) and water levels (*Payette Lakes Protective Ass'n.* v. *Lake Reservoir Co.,* 68 Idaho 111, 189 P.2d 1009 (1948)), and tax cases involving excess profits taxes (e.g., *New York Shipbuilding Corp.* v. *United States,* 237 F.Supp. 995 (D. N.J. 1965)).

The common element in the process that the courts in such cases use in determining the definition of the word is to look to a basic source, the dictionary. The word has slightly varying definitions, depending on which dictionary is consulted, but the following two are typical:

"1. Conforming with or constituting an accepted standard, model or pattern, especially, corresponding to the median or average of a large group in type, appearance, achievement, function, development, etc.; natural; standard; regular."[23]

"1. According to, constituting, or not deviating from an established norm or principal; conformed to a type standard or regular pattern;

. . .

5. Relating to or conforming with long-run expectations or to a permanent standard deviations from which on the part of individual economic

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[23] WEBSTERS NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED, 2D ED. (1974).

phenomena are to be regarded as self-correcting; 6.a. Approximately a statistical norm or average.'"[24]

While some argument may be made for the choice of a "standard" or "norm" definition, these reasons are not persuasive. First, the language of the Plan is being scrutinized in the light of the Act. Since the ADEA is a remedial statute, it should, as pointed out *supra,* be liberally construed. Statutory exceptions to it should be narrowly construed. It logically follows that the device, i.e., the Plan, upon which such an exception is premised should also be strictly construed, so as to give the broadest possible effect to the remedial purposes of the Act. The broadest practical definition of "normal" should therefore be used. Second, the other provisions of the Plan itself dictate that a strict definition of "normal" is improper. The Plan contains provisions allowing earlier than normal and later than normal retirement. It is disingenuous, at the least, to argue that the Plan requires strict adherence to a standard when the Plan itself contains alternatives to this standard. It is clear beyond doubt that other than "normal" dates for retirement are contemplated by the Plan. Third, arguments that the practice under the Plan was uniform in requiring retirement at age 60, and participants could therefore expect nothing else but retirement at age 60, simply beg the question. Whether such action is lawful or whether it is unlawful discrimination is the precise question that must be answered by this Court. To have used uniform past practice as criteria for decision would have led to opposite results in many of the

[24] Websters Third New International Dictionary (1964).

major cases decided by this Court. One example will suffice: Prior to 1954, the school system of Topeka, Kansas had a uniformly applied practice of racial segregation. Students in that school system knew of this uniform practice, and could expect nothing but such segregation. This Court unanimously determined that, prior uniform practice notwithstanding, such segregation violated constitutional standards. *Brown* v. *Board of Education,* 347 U.S. 483 (1954). Additionally, such uniformity might only mean that no one had previously objected to such retirement.

The problem of choosing the appropriate definition of "normal" is also analogous to the interpretation of a contract. In the normal situation, when there is a dispute about the meaning of the terms of a contract, a provision is construed against the drafter of the questioned provision.[25] By analogy, the terms of the Plan should be construed against United, since McMann had no part in the drafting of the contract provision.

In this regard, *Gould* v. *Continental Coffee Company,* 304 F.Supp. 1 (S.D.N.Y. 1969), is also relevant. In *Gould,* the court held that the failure to communicate the provisions of a profit-sharing plan to an employee would relieve the employee of the provisions of the plan which were detrimental to him. The court further held that "[a]ny discrepancy which existed between the plan and its summary must be construed against its draftsman and in favor of plaintiff employee". *Id.* at 3. Logically, this is equally applicable to ambiguities in the language of the plan. This be-

[25] 17A C.J.S., *Contracts* § 324 (1963). *See also,* Alcoa S.S. Co. v. United States, 338 U.S. 421, 424-425 (1949).

comes even clearer when it is recalled that United attempts to use a jargon definition of the word and that McMann can claim absolutely no knowledge or experience in the semantics of annuity contracts. To expect a layman to have knowledge of a specialized use of a word is unrealistic.

When these definitions are considered along with the of construction set forth above, it is clear that the statutory framework and the very words of the plan require a determination that United's Pilots Pension Plan is not within the exception to the statute. In the construction of a remedial statute, with an exception, the statute must be construed liberally in order to give effect to the purpose of the statute. Further, an exception limiting the operation of a statute must be strictly construed. The legislative history and the legislative purpose show that the clear intent of § 4(f)(2) was to protect older workers from discrimination, and not to give employers a vehicle for discriminating against them.

CONCLUSION

For the reasons hereinbefore set forth, Harris S. McMann, Respondent, respectfully prays this Court to affirm the decision of the United States Court of Appeals for the Fourth Circuit, and to remand this case to the United States District Court for the Eastern District of Virginia, Alexandria Division.

Respectfully submitted,

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June 25, 1977